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In the Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL BANCARD CORPORATION,
Petitioner,

vs.

VISA, U.S.A. INC.,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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A. BMI Did Not Reverse Sixty Years of Antitrust Precedent

Characterizing NaBanco's petition for certiorari as "simple minded," Visa tries to sweep aside the sixty years of antitrust precedent proscribing all forms of horizontal price fixing in favor of a new school of thinking which would exalt alleged special economics, market imperfections and efficiencies. (Visa Br. 9). The legal lynchpin for this argument, however, is an erroneous reading of *BMI*[1] as reversing, *sub silentio*, the long established principle that horizontal price fixing is consistently condemned without sojourn into asserted pro-competitive efficiencies. Though glib, Visa's brief actually underscores the importance of granting this petition.

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1. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) ("*BMI*").

If the law required a factual inquiry every time efficiencies were asserted—as Visa and the Eleventh Circuit would have it—only the most blatant price fixing schemes, in support of which no arguable efficiencies could be imagined, would be *per se* condemned. In all other cases, full discovery and trial would be required to litigate the possibility of efficiencies. Obviously, such an inqury would strip the *per se* rule of vitality and meaning. *BMI* made no such fundamental change in the law.[2] But the Eleventh Circuit decision, labelling critical language in this Court's most recent price fixing decision as "cryptic" and "mystifying," and claiming it is "without clear standards" for analyzing assertedly efficient horizontal price fixing arrangements, threatens to do just that. (A. 186, 201-02). The notion that there is a wide safe harbor—in which horizontal price fixing defendants can argue they are "partially integrated joint ventures" supplying products greater than the sum of their parts, and only fix prices "ancillary to efficiency-enhancing integration" (A. 182, 192-94)—is antithetical to *Maricopa* and all of its predecessors.[3] More-

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2. Indeed, in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982) ("*Maricopa*"), this Court reversed the Ninth Circuit and declined the invitation of *amici* to fashion such an exception. *Brief of California Dental Service as Amicus Curiae*, at 3, 6.

3. The practical application of the Eleventh Circuit's efficiency exception is best illustrated by the procedural history of this case. NaBanco's motion for summary judgment was denied, it was put to the burden of taking extensive discovery and proving (1) that what Visa suggested in support of its price fixing—potential pro-competitive efficiencies—did not exist, (2) that Visa had market power, (3) that the price fixing was not unduly restrictive of competition, (4) that the price fixing was not fairly necessary to accomplish the asserted potential efficiencies, and (5) that an alternative to Visa's issuer's fee existed which—regardless of whether it was less restrictive of competition—would promote Visa's competitive success in the marketplace at least as well as its price fixing. (A. 83-104). Visa,

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over, such a doctrine, under which numerous arrangements heretofore illegal will now presumably be validated in the name of efficiency, threatens mischief previously unknown in antitrust annals. The substantial benefits of a conclusive presumption, which this Court reconfirmed in *Maricopa*, 457 U.S. at 344-45, would be completely lost.

In sum, the *per se* rule continues to be the law in horizontal price fixing contexts, this Court must correct the Eleventh Circuit's error. Indeed, if there is to be an exception to the *per se* rule against horizontal price fixing (which we submit there should not), it is this Court which should fashion a workable test, preserving the policies of the antitrust laws. The Eleventh Circuit's construction of a standard, which is ripe for abuse, should not be permitted to stand.

B. The Eleventh Circuit's Opinion Is in Conflict With the Decisions of This Court

Visa's suggestion that the Eleventh Circuit's opinion is in harmony with *Maricopa, Catalano, NCAA* and even *BMI* completely disregards critical aspects of those cases.[4]

Footnote continued—

on the other hand, met its burden of escaping *per se* condemnation simply by showing hypothetical supply and demand curves which theoretically purported to illustrate the possible benefits to Visa of a fixed price. (27:44, 55).

The Eleventh Circuit's test is not only inconsistent with *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980), *Maricopa*, and *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984) (*"NCAA"*)—none of which permitted avoidance of the *per se* rule based on potential pro-competitive efficiencies—but ignores the teaching of *NCAA* which places a *"heavy burden* on the defendant" to justify its restraint, including a showing that the challenged practice is narrowly tailored to accomplish legitimate goals. 468 U.S. at 113.

4. For additional discussion of these authorities, see the Petition at 6-13.

Maricopa involved an allegedly *unique* form of health payment mechanism which defendants contended could not exist without a prior agreement among themselves on the maximum amount they would charge for their services. The plan permitted consumers to choose among numerous physicians, enjoy a wide range of medical services and incur lower health insurance premiums, all with the assurance that their bills would be reimbursed in full. 457 U.S. at 351.[5] Despite these claimed efficiencies—not unlike the "universality" and "special economics" considerations Visa asserts here—the Court found the arrangement *per se* illegal.

Visa likewise misapprehends the significance of the Court's ruling in *Catalano*. Defendants there also argued that the elimination of discounts had significant pro-competitive ramifications, including encouraging entry into the industry and reducing concentration. 446 U.S. at 645. The case thus involved much more than the single issue of whether fixing a component of a price constitutes price fixing. (Visa Br. 11 n.17). This Court's summary reversal of the Ninth Circuit decision constitutes a clear rejection of that court's consideration of market impact and, *a fortiori*, the Eleventh Circuit's concentration on efficiencies here.

In discussing *NCAA*, Visa ignores the crucial fact that "[w]hat the NCAA and its member institutions market . . . is competition itself—contests between competing institutions." 468 U.S. at 101. Thus, contrary to Visa's sug-

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5. Contrary to Visa's statement that application of the *per se* rule turned on the specific facts there (Visa Br. 11), *Maricopa* came before the Court on an incomplete record involving limited discovery, thereby requiring that the facts be viewed in the light most favorable to the defendants. 457 U.S. at 336, 342.

gestion, the Court did not decline application of the *per se* rule because of potential efficiencies but rather because a college football game, by its very nature, cannot exist unless there are two participating institutions. *Id.* In the Court's language, "horizontal restraints . . . [were] essential if the product [were] to be available at all." 468 U.S. at 101. That is obviously not the case with credit cards. (*See infra* at 6).

Turning finally to *BMI*, one must first note that Visa has seized upon dictum in the opinion—removed from the case's special facts—as support for its efficiency loophole in the ban on horizontal price fixing. But as NaBanco set forth in its Petition, the case does not go nearly so far. (Petitioner's Br. 8-9 & n.8). Moreover, Visa is plainly wrong when it says there were no alternatives to the blanket license. (Visa Br. 10 n.16). To the contrary, the Court took comfort in the fact that "there was no legal, practical, or conspirational impediment to CBS's obtaining individual licenses; CBS . . . had a real choice." 441 U.S. at 24. That is not the situation here. (Petitioner's Br. 9 n.8; Visa Br. 10 n.16).

All considered, the Eleventh Circuit's test, whether the fee "potentially could create an efficiency enhancing integration to which the restraint is ancillary" (A. 182), is indeed inconsistent with this Court's decisions. In fact, not even the Eleventh Circuit believed its decision was "routine." (Visa Br. 1). Instead, declaring its difficulty with this Court's prior decisions, it boldly tried to fashion its own, new test. Visa's attempt to walk away from that, and to pretend that the Court of Appeals' decision was simply "routine" is, we submit, neither intellectually honest nor helpful to the process.

One final point must be made: Finding little support in this Court's controlling antitrust authorities, Visa has resorted to the well-worn tactic of wrapping the lower court's opinion in "factual findings" as a reason for denying certiorari. Although the relevant facts are not in dispute and mandate that NaBanco's petition be granted,[6] there is a temptation to respond to Visa's picking and choosing of the facts it cites. Succumbing slightly, in the interest of fairness, NaBanco would only point out the following.

(1) Visa's argument that a single bank could not produce "the Visa payment service" which involves multiple banks (Visa Br. 12), is not only tautological, but misses the point. Single entities, including banks, *do* and *have* produced national general purpose credit cards. (Petitioner's Br. 12 n.9). The issuer's fee is therefore not necessary to make such a product available to the public.

(2) Visa's argument that the system cannot effectively function unless issuing banks have agreed in advance on a discount at which they will purchase receivables (Visa Br. 8) fails to address the issue *sub judice*. Certainty of obligation (or as Visa calls it, "universality")—irrespective of whether it would in fact exist in a completely free market—can obviously be achieved without such price fixing.[7] What the Eleventh Circuit has missed, and Visa

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6. Visa's card issuing banks, as horizontal competitors, fix a discount to the face amount of receivables they each purchase from merchant banks, thereby guaranteeing themselves hundreds of millions of dollars in revenue. The issuer's fee thus stands on a completely different footing from other rules within Visa which do not tamper with price, "the central nervous system of the economy." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59; e.g., *NCAA*, 468 U.S. at 101.

7. This is critically important since *NCAA* requires that even a legitimate purpose can permissibly be achieved only

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simply brushes aside as a "weakly offered" suggestion (Visa Br. 9 n.14), is that universality would be achieved by the continuation of the Visa rule requiring each issuing bank to purchase its cardholders' receivables.[8] Like checks, the paper would then interchange at its face amount rather than at a price fixed discount inuring to the benefit of the issuing banks.

Footnote continued—

through means narrowly tailored to its accomplishment. 468 U.S. at 113. *Accord Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1495 (D.C. Cir. 1984); *Los Angeles Memorial Coliseum Commission v. National Football League*, 726 F.2d 1318, 1397 (9th Cir.), *cert. denied*, 469 U.S. 990 (1984); *North American Soccer League v. National Football League*, 670 F.2d 1249, 1261 (2d Cir. 1982), *cert. denied*, 459 U.S. 1074 (1982).

8. Visa's rule simply confirms that pre-existing obligation of the issuing banks to their cardholders. (8:1496; 36:135; 15:180-82; 22:291; Uniform Commercial Code §§ 5-103(1)(a)(b), 5-114).

CONCLUSION

For all the reasons above and in Nabanco's Petition, a writ of certiorari to the Eleventh Circuit Court of Appeals should issue. This case raises serious questions of antitrust doctrine with far-reaching implications in all horizontal price fixing contexts, and places in issue the scope of permissible conduct by the nation's largest credit card corporation.

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Respectfully submitted,

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